NO. 81-2198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ABDULLAH MUHAMMAD, Petitioner,

vs.

DALE TOOLEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT,
DALE TOOLEY, IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a cause of action exist for a private person to seek civil remedies against a district attorney for his refusal to prosecute a suspect.

2. Is a district attorney absolutely immune from liability in civil suits for activities performed within his prosecutorial duties.

3. Is a prosecutor a "court of last resort" if he is granted immunity from civil liability for acts performed within his prosecutorial discretion.

4. Do treaties between the United States and Saudi Arabia have any effect on the outcome of this case.

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ABDULLAH DOHAISH, Petitioner,

vs.

DALE TOOLEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT, DALE TOOLEY, IN OPPOSITION

STATEMENT OF THE CASE

On February 23, 1981 Mr. Abdullah Dohaish commenced an action in Federal District Court against district attorney, Dale Tooley, alleging that Mr. Tooley's refusal to prosecute Mr. Eddie Santistevan, the alleged murderer of Plaintiff's son, was based upon discrimination against Arab Nationals and violated the Plaintiff's statutory and constitutional rights.

Defendant filed a Motion to Dismiss the case alleging that a district attorney is absolutely immune from liability in civil suits for actions taken within the scope of

his prosecutorial duties. The trial court granted the motion finding both that Plaintiff had no standing to pursue the action on his own behalf or on behalf of his deceased son and that the doctrine of prosecutorial immunity provided to the defendant absolute immunity from suit.

Plaintiff appealed the dismissal to the Court of Appeals for the Tenth Circuit. After briefs and oral argument the Tenth Circuit upheld the trial court's dismissal finding that the doctrine of prosecutorial immunity barred the suit and that no cause of action existed to sue the prosecutor for failure to prosecute.

Plaintiff's Petition for Writ of Certiorari contains extensive recitation of the facts of this case in addition to those found in the complaint. Because the district court dismissed the case without any type of evidentiary hearing, there actually is no factual evidence before the court relating to the events surrounding the death of Saud Dohaish or the reasons for non-prosecution. Further, the numerous "facts" not contained in the record, but recited in the Petition are not necessary to a resolution of this case because the issues to be decided are purely legal: 1) whether, as a matter of law a civil cause of action exists against a district attorney for failure to prosecute, and 3) whether, as a matter of law, the district attorney is immune from suit for acts performed within his prosecutorial duties.

REASONS FOR DENYING THE WRIT

Contrary to Petitoners' suggestions, this case is not appropriate for review by Writ of Certiorari. The case presents no question of federal law not already decided by the Supreme Court and presents no question of federal law which has been decided differently by the circuits or has been decided differently from previous decisions of this Court. In fact, the lower courts correctly decided the cause of action, and immunity questions presented by this case in compliance with existing case law established by this Court. There exists no compelling reason for this Court to review this case, and the Petition for Certiorari should be denied.

I.

THE LOWER COURTS PROPERLY DETERMINED THAT BECAUSE A PRIVATE PERSON DOES NOT HAVE A RIGHT TO DEMAND ANOTHER'S PROSECUTION, NO CAUSE OF ACTION EXISTS FOR AN INDIVIDUAL TO SUE A DISTRICT ATTORNEY FOR FAILURE TO PROSECUTE.

The Court of Appeals correctly ruled that no cause of action exists for a party to sue a district attorney to force prosecution of another or for damages for failure to prosecute.

Plaintiff attempts to create a cause of action by arguing that as the deceased's father he has a "reasonable expectation" that his son's suspected murderer will be brought to trial. Plaintiff contends that violation of this "reasonable expectation" creates a

right to pursue an action against the district attorney for failure to prosecute. The trial and appellate courts below correctly found that there is no law in the United States that grants to any individual an expectation of the prosecution of another. The lower courts' refusal to allow private citizens to force prosecution by the district attorney or sue for damages for non-prosecution is founded on sound public policy principals. As noted by the court of appeals:

> Such a right is not recognized in the law, and indeed, it would be contrary to public policy to allow every private citizen to force the prosecutor to proceed with a case in pursuit of a private objective. The district attorney is sworn to uphold the law generally and does not have a duty to enforce the law for the purpose of providing satisfaction to a third person who has no direct legal interest.

Dohaish v. Tooley, No. 81-1607 (10th Cir., Co., 1982) (emphasis added).

The refusal of the trial and appellate courts to recognize a cause of action for the district attorney's failure to prosecute is based, in part, upon this Court's decision in Linda R. S. v. Richard D., 410 U.S. 614 (1973). There, plaintiff filed suit

to force the district attorney to sue the defendant, her ex-husband, for failure to pay child support. This court rejected such a suit stating:

> [I]n American Jurisprudence, at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

410 U.S. 614, 619 [emphasis added].

Because there is no recognizable right to have a suspected criminal prosecuted, there is no recognized claim constitutional, or otherwise, to pursue an action based upon violation of that nonexistent right. See, e.g., Warth v. Seldin, 422 U.S. 490, 509 (1975).

Plaintiff's Petition for Writ of Certiorari presents no compelling reasons why this Court should recognize, in violation of existing law and sound public policy, a new cause of action allowing a private person to contest the district attorney's decision not to prosecute.

II.

THE LOWER COURTS CORRECTLY APPLIED EXISTING LAW TO DETERMINE THAT THE DISTRICT ATTORNEY IS ABSOLUTELY IMMUNE FROM LIABILITY IN CIVIL SUITS FOR ACTIVITIES PERFORMED WITHIN HIS PROSECUTORIAL DUTIES.

Plaintiff's complaint is nothing more than an attempt to obtain damages and injunctive relief against the prosecuting

attorney for acts performed within the scope of the prosecutorial function. The specific act alleged is that Mr. Tooley refused to prosecte Eddie Santistevan and in so doing violated the constitutional rights of the decedent and his father who had an expectation of prosecution.

It is well established that the district attorney is a quasi-judicial officer when exercising his prosecutorial duties and is therefore immune from civil suits for damages resulting from acts performed during the exercise of his prosecutorial duties and discretion. Imbler v. Pachtman, 424 U.S. 409 (1976); Kostal v. Stoner, 292 F.2d 492, 493 (10th Cir. 1961), cert. denied, 369 U.S. 868 (1962); Dacey v. Dorsey, 568 F.2d 275 (2nd Cir. 1978), cert. denied, 436 U.S. 906 (1978); Kalec v. Adamowski, 406 F.2d 536 (7th Cir. 1969); Smith v. Dougherty, 286 F.2d 777 (7th Cir.) (cert. denied) 368 U.S. 903 (1961); Maynard v. Kear, 474 F. Supp. 794 (N.D. Oh. E.D. 1979); Axelson v. Summers, 369 F. Supp. 75 (E.D. Mo. 1973); Black v. Stanley, et al., 270 F. Supp. 993 (D. Kan. 1967). As part of the prosecutorial function the district attorney has discretion to decide whether to file a complaint for a violation of the state's criminal statutes and discretion to determine under what statutes he will prosecute. People v. McKenzie, 169 Colo. 521, 458 P.2d 232 (1969); People v. Fowler, 183 Colo. 300, 516 P.2d 428 (1973); People v. Trigg, 184 Colo. 78, 518 P.2d 841 (1974); and People ex. rel. Van Meveren v. District Court In And For Larimer County, 186 Colo. 335, 527 P.2d 50 (1974). Exercise of this discretion by the district attorney is

clearly within his prosecutorial duties. Maynard v. Kear, 474 F. Supp. 794 (N.D. Oh. E.D. 1979).

All of the acts of which the Plaintiff complains are related to actions of Mr. Tooley in his prosecutorial function, i.e. the decision whether or not to charge a suspect. Following a preliminary hearing on this matter and upon consideration of the evidence presented therein, the prosecutor concluded that the accused acted in self defense and that the murder charge could not be proven beyond a reasonable doubt. As such, it was not only within the discretion of the prosecuting attorney, but mandated by his duties to the office to refrain from filing criminal charges when those charges could not, in his estimation, be proven. The American Bar Association's Standards Relating to the Administration of Criminal Justice, "The Prosecution Function" § 3.9(b) (1971).

Plaintiff contends that the absolute immunity granted in Imbler v. Pachtman should apply only when the prosecuting attorney makes the decision to prosecute but not when the prosecuting attorney makes the decision not to prosecute. Clearly this distinction is without a basis in law or reason. The reasons for the prosecutorial immunity are clearly set forth in Imbler v. Pachtman. In summary those reasons are:

(1) The prosecutor would be subject to numerous suits by those who were prosecuted and then had charges dismissed or unproven at trial (Imbler at 421).

(2) "Harassment by unfounded litigation would cause a deflection of the pros-

ecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." (Imbler at 423).

(3) If the prosecutor could be made to answer in court each time that he charged an individual with wrongdoing his energy would be spent in attending to those suits as opposed to being spent in carrying out the duties of his office. (Imbler at 425).

(4) Various post-trial procedures are available to the defendant if he has not received a fair trial at the hands of the prosecuting attorney.

(5) Allowing the prosecutor to be subject to criminal suit would not serve the public interest since the prosecutor could not fearlessly and vigorously perform his duties as a prosecutor. (Imbler at 428).

The above considerations are equally applicable where suits are brought by grieving relatives or injured parties against the prosecutor for refusal to pursue criminal charges against a suspect. The prosecutor could be subject to undue harassment for refusal to prosecute those who the injured parties or relatives felt caused the injury. The threat of such suits might coerce a prosecutor to pursue cases, in violation of his ethical duties, where he did not feel that probable cause existed or cases which could not be proven beyond a reasonable doubt. If civil suits were allowed for failure to prosecute, the exercise of prosecutorial discretion would be unduly influenced by public

opinion. Such influence could result in charges being brought against innocent persons or in charges being brought when the prosecutor knew that the charges would not be substantiated at trial, whether or not the prosecutor believed in the suspect's guilt or innocence.

If private citizens were allowed to interfere with the discretionary decisions of the district attorney in deciding which suspects to prosecute independence of the office would be destroyed. The prosecutor would be unable to act within the ethical standards established by the American Bar Association relating to the exercise of the prosecutorial function. The Standards Relating to the Administration of Criminal Justice "The Prosecution Function" § 3.9 pg. 73-99 (1971) state the various considerations a prosecutor should review before filing charges against a suspect. This standard recognizes that in certain situations, there are reasons for nonprosecution even though the prosecutor may believe the suspect is guilty. The standard specifically states:

> (a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

Id. § 3.9(b) (1971) (emphasis added).

Petitioner has presented no compelling reason why the long-established and well-founded doctrine of absolute immunity for prosecutors acting within the scope of their prosecutorial duties should be limited in cases of nonprosecution.

III.

PETITIONER'S CHARACTERIZATION OF THE PROSECUTOR AS A "COURT OF LAST RESORT" IGNORES THE CHECKS AND BALANCES CREATED BY COLORADO LAW ON THE EXERCISE OF THE PROSECUTOR'S CHARGING DISCRETION.

Petitioner alleges that this court should grant only qualified immunity to prosecutors when they refuse to prosecute a case, because otherwise the prosecutor becomes the "court of last resort." This characterization is without support. In the specific case of Saud Dohaish, remedies, other than a civil suit against the prosecutor, were available if petitioner felt that the prosecutor did not properly exercise his discretion by not filing charges.

Pursuant to Colo. R. Stat. § 16-5-209 (1973) Mr. Dohaish could have filed an action requesting a judge to issue an order to the prosecuting attorney to show cause why he had not pursued the case or not filed charges against Mr. Santisteven. The prosecuting attorney would then have been required to present to the court the reasons why he did not bring charges. If the court felt the charges should have been brought the court could direct the prosecuting attorney to file the charges and appoint a special prosecutor to handle the case. The purpose

of the statute is to allow a person who feels the prosecuting attorney is not pursuing a case diligently or not filing charges for improper reasons, to seek court review of the prosecutor's actions.

Additionally, Abdullah Dohaish could have filed a wrongful death action against Eddie Santistevan for the death of Saud.

Further, in the instant case it is important to remember that the charges were not dismissed by the prosecuting attorney, but by the court upon motion of the prosecuting attorney. The court heard the evidence presented at the preliminary hearing and could have, if in the court's belief such action was justified, refused to dismiss the charges against Mr. Santistevan. Petitioner has recognized the court's authority to refuse to dismiss charges. United States v. Johnson, 577 F.2d 1304, (5th Cir. 1978).

The above safeguards effectively provide to the private citizen the opportunity to challenge the prosecutor's decision by obtaining a court's review of the prosecutor's actions.

Petitioner has presented no compelling reason to limit the absolute immunity granted to prosecutors for refusal to prosecute, and therefore the Petition should be denied.

IV.

THE TREATY BETWEEN SAUDI ARABIA AND THE UNITED STATES IS OF NO EFFECT ON THE ISSUES OF THIS CASE.

Petitioner cites a Treaty between the United States and Saudia Arabia U.S.T. 203.2804 TIAS 6749, to imply that the actions of the district attorney in failing to prosecute were in violation of the Treaties between the United States and Saudi Arabia. The Treaty provides that:

> Each government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty free entry of personnel effects, a residence, and exit as is consonant with its national laws and regulations.

U.S.T. 203.2804. TIAS 6749, Article IX.

The existence of this treaty and entrance into the United States of Saud Dohaish under this treaty is of no relevance to the facts of the case. There is nothing to suggest that Saud Dohaish was granted any less or any greater rights than any citizen of the United States. There is no constitutional issue involved in the existence of this treaty and no reason for this court to hear the

present case based upon the existence of that treaty.

CONCLUSION

Because the lower courts' decisions are based upon sound case law previously established by this Court the Petition for Certiorari should be denied.

DATED this 11th day of June, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 1982, a true and correct copy of the above was placed in the United States mail, postage prepaid, properly addressed as follows:

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